Court No.3

Criminal Jail Appeal No. 1810 of 2001

Bhim Singh .....Appellant.

Versus

State .....Respondent.

Hon'ble Irshad Husain, J.

This is an appeal against the judgment and order dated 11.1.1999 passed by Sessions Judge, Tehri Garhwal convicting the appellant U/Ss 376/363/366 IPC and sentencing him to undergo R.I. for 10 years U/S 376 and R.I. for 7 years each U/Ss 363 IPC and 366 IPC. All the sentences were directed to run concurrently.

The prosecution case in brief is that Bhim Singh was employed as a driver in Jai Prakash Company which had under-taken a contract work in Tehri. Informant Jamuna Nandan (P.W.3) was running a tea stall in the premises of the said construction company. The accused was having social relations with the said informant and used to visit his house. On 21.3.1997 Km. Sudha (P.W.1) daughter of the said informant went to attend her school known as Rajmata Nepolian College where she was studying in class 9th but she did not return home that day. A missing report, Ex.Ka.1 was lodged by the informant at Dobata Police Post, Tehri. Subsequently it transpired that the girl was seen in the company of accused Bhim Singh near bus station. On 26-3-1997 informant along with police personnel went to Sultanpur in search of his daughter as accused was resident of village Barwari of district Sultanpur. She was recovered form the house of the accused on 27-3-1997 and was brought to Tehri. Thereafter the informant gave another information, Ex.Ka.2 at the Police Post, on the basis of which case was registered against the accused vide check F.I.R., Ex.Ka.11. Km. Sudha was medically examined and thereafter she was given in the supurdagi of the informant vide supurdaginama, Ex.Ka.7. The statement of the witnesses were recorded by the Investigating Officer, S.I. Mahavir Goswami (P.W.8) who on completion of investigation submitted charge sheet, Ex.Ka.10 against the accused.

At the trial prosecution examined 9 witnesses in evidence. Of these P.W.1, Km. Sudha is the prosecutrix who gave out that she was enticed away

by the accused on 21-3-1997 and was taken to Haridwar, Lucknow and ultimately to Sultanpur. P.W.2, Ram Parwesh had seen the accused and Km. Sudha together on 21.3.1997 at bus station. P.W.3, informant Jamuna Nandan supported the prosecution version and proved the F.I.R. According to him his daughter Km. Sudha was aged about 15 years. P.W.4, Ajai Singh is also a witness of the fact that accused and Km. Sudha were seen together on 21.31997. P.W.5, Smt. Kalawati is the mother of the prosecutrix and she gave out that the accused had enticed away her daughter on the pretext of marrying her. She also stated that Ram Parwesh (P.W.2) is her nephew and relation with him are cordial. P.W.6, Smt. Shaila Devi gave evidence to the effect that accused Bhim Singh used to visit the house of the informant and that he had enticed away Km. Sudha when she went to her school on 21.3.1997. P.W.7, Dr. Sushama Chandra of Female Hospital Tehri examined Km. Sudha on 31.3.1997 and prepared the examination report, Ex.Ka.3. According to her there was no mark of injury on the private part and other parts of the body of the victim. The hymen was found torn with old healed tag and vagina admitted two fingers easily. She also proved supplementary report, Ex.Ka.4 which was based on x-ray report as a result of which the age of the girl Km.Sudha was determined as about 18 years. In cross examination she gave out the possibility that the age of the girl could even be about 22 years.

P.W.8, S.I. Mahavir Goswami proved the steps taken towards the investigation of the case. He also proved a certificate said to have been given on 26-3-1997 by the principal of Tehri Baandh Pariyojana Uchachatar Madhyamik Vidyalaya Tehri regarding the date of birth of Km.Sudha. It is, Ex.Ka.6. The date of birth shown is 11-6-1982. P.W., constable Kushala Nand formally proved the check F.I.R. referred above and copy of the G.D. report of registration of the case, Ex.Ka.12.

The accused did not admit the accusation of the prosecution and stated that he has been falsely implicated in this case.

Learned Sessions Judge on the basis of his appreciation of the evidence on record was of the view that the age of the girl was about 15 years in view of the date of birth as mentioned in the certificate, Ex.Ka.6 and that the prosecutrix K. Sudha was deceitfully kidnapped and was subjected to rape by the accused against her will and consent and accordingly convicted the accused and sentenced him as mentioned above.

Heard Sri J.S.Virk Amicus Curiae and Sri R.S. Sambhal A.G.A. and have carefully perused the evidence on record.

Learned counsel for the accused-appellant submitted that the learned Sessions Judge wrongly placed reliance on the certificate, Ex.Ka.6 regarding the date of birth of the girl Km. Sudha as the document was not legally proved by producing the witness who prepared the certificate on the basis of the entry in school register. The submission has force because neither the principal who issued the said certificate was examined in evidence nor any school leaving certificate was produced to prove that the date of birth of Km. Sudha was 11-6-1982. Form F.I.R., Ex.Ka.1 it is evident that Km. Sudha was studying in Rajmata Nepolian College in Tehri whereas the certificate was obtained from some other school known as Tehri Baandh Pariyojana Uchchatar Madhyamik Vidyalaya, Tehri, If Km. Sudha had studied in that school earlier the best evidence would have been to produce the school leaving certificate. In any case the record of the school in which Km. Sudha was presently studying should have been produced but this was not done and strangely enough a certificate from the principal of another school was given to the Investigating Officer to be brought on record to prove the age of the girl. The authenticity and genuineness of this certificate has not been proved for the reasons stated above and therefore the learned Sessions Judge was not justified in placing reliance on it do determined the age of the girl.

Both the parents of the girl informant Jamuna Nandan, P.W.3 and mother Smt. Kalawati, P.W.5 have not disclosed the date of birth of Km. Sudha. According to P.W.3, Jamuna Nandan his marriage was solemnized about 24 years ago and Km.Sudha is younger too the eldest son. He had shifted to Tehri from his village in the state of Bihar in the year 1978 and all his children were born in his ancestral village in the state of Bihar. Smt. Kalawati also could not disclose the correct period as to when Km. Sudha was born and considering the evidence of informant Jamuna Nandan it clearly appear that Km. Sudha must have been born much earlier to 1982, the year of birth shown in the certificate referred above. In a situation like this the medical evidence regarding the age assumes significance. As also mentioned above the evidence of the Medical Officer and the medical examination report, Ex.Ka.4 prove that the age of Km. Sudha was found to be about 18 years on 31.3.1997. The evidence is based

on the fact that x-ray epiphysis around wrist and elbow joints have fused with their respective shafts and besides this according to the physical appearance also the age was determined by the Medical Officer. The Medical Officer was even of the view that the age of the girl could be about 22 years. There is nothing to indicate any infirmity in the medical evidence in this regard and the learned Sessions Judge should have placed reliance on this evidence in regard to the age of Km.Sudha instead of placing reliance on certificate, Ex.Ka.6 which was not duly proved by the corresponding record and also by the evidence of the principal who had issued it. Considering the material on record it is obvious that he conclusion of the learned Sessions Judge about the age of the girl is incorrect and in fact the age of Km. Sudha was not less than 18 years at the time of the occurrence.

The learned Amicus Curiae also drew attention to the evidence of Km. Sudha to bring home his point of view that she had left her house and remained with the accused out of her own free will and consent and that in the peculiar facts and circumstances of the case she was not subjected to sexual intercourse against her will. Km. Sudha (P.W.1) gave out that she had boarded the passenger bus from Tehri on 21.3.1997 with the accused and reached Haridwar. When she barded the bus with the accused there were about 20-25 people at the bus stand. She also admitted that police personnel also remain on duty there at the bus stand. She has not made any hue and cry to attract people present there at the bus stand which indicate that she willingly left with the accused on that day. She also stated that on 22.3.1997 she traveled with the accused to Lucknow form Haridwar and in Lucknow they together went to take round of the city and purchased clothes. From Lucknow she went to Sultanpur with the accused and from there they went to village Barwari where they stayed together for about 5-6 days till her recovery was made by the police. She also stated that as and when she traveled with the accused in passenger bus, the bus was crowded with the passengers. She claimed that on account of fear of the accused she did not raise any alarm and refrained from informing any one else that she had been kidnapped by the accused. Considering the categorical assertion by her that she used to travel form one place to another in the company of large number of people without any hesitation and raising any suspicion about her movement with the accused lead to one and the only inference that she left her house with the accused out of her own free will and

consent and that neither she was enticed away on any false pretext nor she was put to any threat to refrain form making any complaint against the accused. In a situation like this when she stayed with the accused at different places with her own free consent it cannot be safely accepted that rape was committed on her against her will. In the totality of the circumstances of the case there was no occasion to place reliance on her evidence that she was forced to submit herself to intercourse under threat by the accused. The learned Sessions Judge did not take into consideration the evidence of the prosecutrix in proper perspective also and the inference drawn that she was subjected to sexual intercourse under threat and against her consent and will can not therefore be said to be just and proper.

For the above reason and discussion the only conclusion which can be arrived at is that Km.Sudha left her house with the accused out her own consent and free will and the she had not been subjected to sexual intercourse against her consent and under threat by the accused. The charges framed against the accused were therefore not established beyond doubt from the evidence on record and the judgment and order of conviction and sentence passed by the learned Session Judge cannot therefore be maintained.

For the reasons stated above this appeal succeed and is accordingly allowed. The judgment and order dated 11.1.1999 passed by Sessions Judge, Tehri Garhwal convicting and sentencing the accused-appellant U/Ss 376/363/366 IPC is set-aside. He is held not guilty and acquitted of the charges U/Ss 363/366/376 IPC. He is in jail. He shall be released forth-with if not wanted in connection with any other case.

Learned Amicus Curiae shall be paid fee as prescribed.

(Irshad Hussain, J.)

Dated 21-8-2003

ISB